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Supreme Court of the United States

OCTOBER TERM, 1975

NO. 76-75

HON. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, STATE OF LOUISIANA, HON. HARRY CONNICK, DISTRICT ATTORNEY, PARISH OF ORLEANS, STATE OF LOUISIANA, DR. WILLIAM H. STEWART, DIRECTOR LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION

Appellants

versus

LINDA FAYE WEEKS, WIFE OF GARY ALBERT RAIMER and GARY ALBERT RAIMER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Appellees

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

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Appellees

JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

OPINION BELOW

The opinion of the three-judge district court for the Eastern District of Louisiana, dated January 26, 1976, is as yet unreported, but is set out in Appendix I. The judgment of the district court, dated February 20, 1976, is set out in Appendix II. The amended judgment, dated June 12, 1976, is set out in Appendix III.

JURISDICTION

This suit was brought under 42 U.S.C. § 1983 to declare

unconstitutional and enjoin the enforcement of a state statute, 14 Louisiana Revised Statutes, Title 14 §87 and § 88. The judgment of the three-judge district court was entered on February 24, 1976, and notice of appeal was filed in the district court on March 19, 1976, Appendix IV. The appellants filed on April 7, 1976 a motion to correct the judgment, which motion was argued and submitted to the court on April 28, 1976. An amended judgment of the three-judge court was entered on June 17, 1976. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

STATUTES INVOLVED

Louisiana Revised Statutes, Title 14, Section 87 and 88; West's Louisiana Statutes Annotated–Revised Statutes, vol. 9A (1974) at pp. 83 and 89 read as follows:

§87. Abortion

Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:

(1) Administration of any drug, potion, or any other substance to a female; or

(2) Use of any instrument or any other means whatsoever on a female.

Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years.

§ 88. Distribution of abortifacients

Distribution of abortifacients is the intentional:

(1) Distribution or advertisement for distribution of any drug, potion, instrument, or article for the purpose of procuring an abortion; or

(2) Publication of any advertisement or account of any secret drug or nostrum purporting to be exclusively for the use of females, for preventing conception or producing abortion or miscarriage.

Whoever commits the crime of distribution of abortifacients shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

QUESTION PRESENTED

Whether Louisiana's criminal abortion statutes unconstitutionally conflict with the principles of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

STATEMENT OF THE CASE

The Raimers, appellees in this case, filed suit on February 20, 1973, approximately one month after this Court's decisions in *Roe v. Wade*, supra, and *Doe v. Bolton*, supra, seeking declaratory and injunctive relief against two Louisiana criminal statutes prohibiting abortion. The appellees also sought injunctive relief to require state hospital facilities to be made available for abortions.

When suit was filed, Linda Weeks Raimer was approximately 8 to 10 weeks pregnant, indigent, married and living with her husband, Gary Raimer. While an emergency patient at New Orleans' Charity Hospital in February, 1973, she requested, but was refused a first-trimester abortion. Subsequently, after being discharged from Charity Hospital and after filing this suit, she had her pregnancy aborted in Washington, D.C.

All proceedings in this case were temporarily stayed on August 3, 1973, by a joint motion and order pending a decision upon remand by another three-judge district court in *Rosen v. Louisiana State Board of Medical Examiners.*[1]

A copy of the stay order is set out in Appendix V.

In *Rosen*, the plaintiff had challenged the constitutionality of Louisiana's Medical Practices Act[2] which authorized the suspension or revocation of a physician's license for performing an abortion. Prior to *Roe*, the three-judge district court had upheld the state statute as constitutional in *Rosen*

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1. 318 F.Supp. 1217 (E.D. La. 1970), *vacated and remanded*, 412 U.S. 902 (May 21, 1973).

2. La. R.S. 37:1285(6), (9) and (11) read as follows: "§ 1285. Causes for refusal to issue, suspension or revocation of certificates

The board may refuse to issue, suspend, or institute proceedings in any court of competent jurisdiction to revoke any certificate issued under this Part for any of the following causes:

. . .(6) Procuring, aiding or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician; or
. . .(9) Efforts to deceive or defraud the public;
. . .(11) Incompetence;"

I[3]. Upon remand, *Rosen* II[4] held the act unconstitutional under *Roe* and *Doe*, which decision was affirmed by this Court without oral argument.[5]

After *Rosen* II was decided by the three-judge district court upon remand, the present case was re-activated. Several motions were filed including: 1) defendant Harry Connick's motion for a three-judge district court, see Appendix VII, and 2) plaintiff's motion for summary judgment by the single-judge court, citing *Roe* and *Rosen* II. Both motions were decided by the single judge in favor of the defendants. On November 18, 1974, a three-judge court was designated to hear the case.

In December, 1974, this case was transferred to another three-judge court which had been convened to consider other cases involving abortion-related issues. On March 4, 1975 the court requested briefs on the necessity of a three-judge court, see Appendix VIII. Ultimately four cases were consolidated for a trial on the merits before the three-judge panel at a hearing on May 27, 1975. At the time testimony was heard and all motions were submitted on the briefs.

The final decision, which is part of a consolidated opinion, and the judgment as amended in this case held that La. R.S. 14:87 and 88 are unconstitutional as applied to licensed physicians on the basis of *Roe* and *Doe*. As for the policy of Charity Hospital, however, the court held that the evidence did not sustain the plaintiff's claim "that Charity Hospital of New Orleans has a silent policy among those in authority that elective abortions are prohibited. . ."

3. 318 F. Supp. 1217 (E. D. La. 1970).

4. 380 F. Supp. 875 (E. D. La., July 11, 1974). See Appendix VI.

5. 419 U.S. 1098 (January 13, 1975).

Not only did the court *declare* La. R.S. 14:87 and 88 to be unconstitutional, but the court also *enjoined* the defendants from enforcing La. R.S. 14:87 and other state statutes declared unconstitutional, (paragraph V of the original judgment, see Appendix II; and the amended judgment, see Appendix III).

A notice of appeal to this Court was filed on March 19, 1976, under 28 U.S.C. Section 1253 on the basis that a three-judge court constituted under 28 U.S.C. Section 2281 had issued an injunction restraining the enforcement of the two Louisiana criminal statutes by restraining the appellants, officers of the State of Louisiana, from enforcing those statutes.

THE QUESTION IS SUBSTANTIAL

Upon a first reading of the statutes involved and the question presented, it must certainly seem that this appeal is "patently frivolous", "clearly lacking in merit," and quite suitable for summary affirmance without oral argument under *Roe*, *Doe*, and *Rosen* II.

However, this case would not now be in this Court by way of appeal if the issue were not "substantial." That is, procedurally a three-judge court would not have been convened in this case long after *Roe* and *Doe*, much less an injunction issued, if the defendants had not met the jurisdictional requirement of a "substantial" defense.[6]

Our defense is novel. It does *not* request the overruling of *Roe* and *Doe*. *Nor* does it attempt to establish when life

6. See *Bailey v. Patterson*, 396 U.S. 31 (1962).

begins.[7] Rather, our defense calls for a careful reading of *Roe* "in context." See *Connecticut v. Menillo,* U.S. , 96 S. Ct. 170, 46 L.Ed. 2d 152 (1975).

We contend that Louisiana's criminal abortion statutes are constitutional although they fail "to contain any reference to a gestational time period [or] to incorporate and reflect three stages of pregnancy." *Planned Parenthood of Central Missouri v. Danforth,* U.S. , (1976) (19 Cr. L.R. 3225, 3229, June 30, 1976). We base our contention upon a "compelling interest" not considered in *Roe* and *Doe*, one which only Louisiana is capable of asserting.

SIGNIFICANCE OF THE PROCEDURAL HISTORY

Our assertion that the "question is substantial" is inextricably intertwined with the procedural posture of the case.

More specifically, the district court decided two issues in favor of the defense which have a bearing on the issue of "substantiality", namely:

1) whether the decision would be made by a single-judge or by a three-judge court; and, if by a three-judge panel, 2) whether the judgment would simply declare the statutes unconstitutional or would also enjoin enforcement of the statutes.

It became painfully apparent to the defense after *Rosen II*[8] that the district court would not seriously entertain attempts to limit or distinguish the language of *Roe* and *Doe* and thus would ultimately declare the two statutes unconstitutional.

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7. See *Abele v. Markle,* 351 F. Supp. 224 (D. Conn. 1972), *vacated and remanded,* 410 U.S. 951 (1973).

8. See especially Judge Ainsworth's concurring opinion, 380 F. Supp. 875, (E.D. La. 1974), Appendix VI.

Why then was it necessary to convene a three-judge court in this case?

After all, two of the judges (Judges Ainsworth and Cassibry) who decided this case also sat on the three-judge panel in *Rosen* I and II.

There were only two substantive issues in this case: the constitutionality of the two statutes and the policy of Charity Hospital regarding abortions. This latter issue did not involve a statute or policy of statewide application and thus, standing alone, it did not justify a three-judge court. The challenge to the constitutionality of the two statutes provided the only basis for convening a three-judge court.

But why did the court not refrain from consolidating this case with the other three cases which more clearly called for three-judge courts? Certainly, the court had the opportunity to do so when defendant Connick moved not to have this case consolidated with the others. See Appendix I, at 4a.

Did the court not realize that the issue of a three-judge court is jurisdictional, that the parties cannot simply consent to a three-judge court, but that the court, sua sponte, must consider the issue? *See Calcero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 669-70 (1974); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 153 (1963); *Sands v. Wainwright,* 491 F.2d 417, 424 (5th Cir. 1973). Was the court unaware that a three-judge court should not be convened if the constitutional defense to the validity of a state statute is "frivolous?" *Bailey v. Patterson,* 369 U.S. 31 (1962).

Quite the contrary, on March 4, 1975, prior to consolidating the cases, the court sua sponte requested counsel to brief the question of whether the three-judge court already

convened should continue in existence or be dissolved. See Appendix VIII. The final opinion does not specifically address the jurisdictional issue. However, that issue was extensively briefed and was in fact inseparable from the defense of the statutes on the merits. As announced by Circuit Judge Ainsworth at the May 27, 1975 hearing, the court charged that issue with the case. The final decision and the judgment were simply issued by the court as a three-judge court.

Although squarely faced with the jurisdictional issue of neither the single judge nor the three judges of the district court committed this case to a single-judge court on the basis that the defense of the statutes constitutionality was "wholly insubstantial," as have some other district court. *E.g. Rodos v. Michaelson,* 396 F.Supp. 768 (D.R.I. 1975); *Doe v. Israel,* 358 F. Supp. 1193, (D.R.I.) *motion dismissed* 482 F.2d 156 (1st Cir. 1973) *cert. denied,* 416 U.S. 993 (1975).

Admittedly however, even if the three-judge court's implied jurisdictional finding that our defense is *not* "wholly" insubstantial or "obviously" frivolous, *see Hagans v. Levine,* 415 U.S. 528, 537 (1974); *Goosby v. Osser,* 409 U.S. 512, 518 (1973), is correct, that does not mean that the issues raised in defense of the statutes are *so* substantial as to merit plenary review by this Court.

The fact that the district court also issued an injunction has some significance. That is, while the judges' sense of prudence might account for retaining the three-judge court, that same sense of prudence would have recommended against issuing an injunction if a declaratory judgment would have sufficed– unless, of course, the issue was substantial enough to merit consideration by this Court.

Several three-judge courts, while declaring a state abortion

statute unconstitutional, have nevertheless refused injunctive relief as unnecessary, *e.g. Doe v. Turner,* 361 F.Supp. 1288 (S.D. Iowa), *appeal denied,* 488 F.2d 1134, (8th Cir. 1973) *Henrie v. Derryberry,* 358 F.Supp. 719 (D.C. Okla. 1973). Citing language in *Roe*[9] these courts have assumed that the state-officer defendants would abide by the court's declaration of unconstitutionality.

Similarly, in this case the court could have, but did not, decline to issue an injunction. There was no finding, nor even an allegation, that the defendants would ignore the court's decision. Moreover, beyond the complaint the plaintiffs did not press for injunctive relief. Rather, the *defendants* urged in their brief that the court recognize the seriousness of its defense at least by enjoining the enforcement of the statute, without which the defendants had no hope of reaching the Supreme Court by way of direct appeal. *See Spannaus v. Hodgson,* 420 U.S. 903 (1975), *dismissing for lack of jurisdiction the appeal in Hodgson v. Anderson,* 378 F. Supp. 1008 (D. Minn. 1974).

LOUISIANA'S "COMPELLING INTEREST" AND *ROE* READ "IN CONTEXT"

Consider the following syllogism which is set forth in *Roe:* (1) (Sec. III of the opinion) - The right to privacy includes the decision to abort;[10] (2) (Sec. IX) Only (A) if the unborn is a Fourteenth Amendment person [11] or (B) if the State of Texas has a compelling interest can the right to privacy/abortion be limited.[12] (3) (Sec.X) (A) Because the unborn is not a Fourteenth Amendment person and (B) because the State of Texas has not demonstrated a compelling interest to protect the unborn from conception, abortion can not be prohibited until some time later in the pregnancy when state interest be-

9. 419 U.S. at 166.
10. Id. at 154.
11. *Id.* at 156-159.
12. *Id.* at 159-162.

comes compelling.[13]

The court structured its opinion by starting with an *almost* irrebutable presumption in favor of the woman's right to abort and then shifting the burden to the state.[14] Texas failed to prove to the Court's satisfaction (A) that the unborn child is a Fourteenth Amendment person or (B) that Texas has a compelling state interest in protecting life or potential life from the point of conception.

Without challenging either the holding that the right to privacy includes the decision to abort or the holding that the unborn is not a Fourteenth Amendment person, we can demonstrate a "compelling interest" not argued by Texas or any other state.

The Court's opinion considered three possible reasons "to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence."[15] First of all, the discouragement of illicit sexual conduct was not seriously urged and was agreed not to be a proper state purpose. Secondly, the state's concern with medical procedure and maternal health was recognized as possibly the primary reason for enacting the laws.[16] But in light of improved scientific technology, this state interest was found to become "compelling" only after the first trimester.[17] Thirdly, the state's interest in protecting potential life was considered questionable as the reason for enacting abortion laws.[18] However, the court's opinion recognized that the state had a legitimate interest in "potential life" which becomes "compelling" only in the third trimester of pregnancy.[19]

13, *Id.* at 163-264.

14. Byrn, "An American Tragedy-The Supreme Court on Abortion". 41 Fordham L.R. 807 (1973).

15. *Id.* at 147.

16. *Id.* at 148-151.

17. *Id.* at 163.

18. *Id.* at 151-152.

We contend that Louisiana alone among the states can demonstrate a *fourth* reason to explain the original enactment of its criminal statute prohibiting abortion from conception. That is, the criminal abortion statute in Louisiana serves as the public law protection of the private civil law concept of "personhood", a legal term which is central to the private law of a civilian jurisdiction; and which has a definite technical meaning unlike anything in the common law.[20]

A. History

Historically, we can demonstrate that the enactment in 1855 by Louisiana of a very restrictive criminal abortion statute[21] did not represent a departure from a much freer

19. *Id.* at 162-163.

20. *cf. Puerto Rico v. Russell & Co.*, 288 U.S. 476, 480-482 (1933).

21. La: Acts, 1855, Act 120, Sect. 24, p. 132.

> "That whoever shall feloniously administer, or cause to be administered any drug,potion or any other thing to a woman for the purpose of procuring a premature delivery; and whoever shall administer, or cause to be administered to any woman pregnant with child, any drug, potion or any other thing for the purpose of procuring abortion, or a premature delivery, shall be imprisoned at hard labor, for not less than one, nor more than ten years."

The statute punishes only the attempt to procure abortion or premature delivery; and it is not necessary that the drug or potion administered or caused to be administered, has had the effect intended. It is the intent that characterizes the offense; and that intent must be felonious, not that the drug or potion must be calculated to produce the desired effect, but that the object of giving it must be to cause a premature delivery or abortion.

tradition as was apparently the case in common law jurisdictions.[22] If anything, the passage in 1855 of a separate abortion statute represented something of a "liberalization" of a crime always considered in civilian law to be murder.

The criminal law in effect in Louisiana until 1805, two years after the Louisiana Purchase, defined abortion as homicide punishing the perpetrator, including the mother, with death:

> Law VIII.
>
> A Pregnant Woman Who Knowingly Eats or Drinks Drugs To Produce Abortion Shall Suffer the Penalty of Homicide.
>
> "Where a pregnant woman knowingly takes drugs or anything else whatsoever to produce abortion, or gives herself blows in the abdomen, with her fist or with anything else, for that purpose, and by this means loses her child; we decree that, if the latter was living at the time of this, *she must be put to death* for the offense except where she acted under compulsion, as, for instance, where Jews force their Moorish women to do this; for, under such circumstances, the party who uses compulsion must undergo the penalty. If the child was not living at the time, the woman cannot then be put to death on this account, but she shall be banished to some island for the term of five years. We decree that a man shall suffer the same penalty who knowingly strikes his wife while she is pregnant, so that she loses her child by reason of the blow. *If a stranger should do this he shall suffer*

22. 410 U.S. at 140.

> *the penalty of homicide* if the child was living when it lost its life through his fault, and if it was not living at the time, he shall be banished to some island for the term of five years.[23] (Emphasis added)

The law contained are *no exceptions for the health or life of the mother.* Nor did the penalty hinge upon "quickening" as in the common law.

In 1805, Louisiana adopted the common law as to the definition of crimes.[24] According to judicial interpretation of this act, Louisiana did not adopt all the crimes and misdemeanors known to the common law at that date, but merely adopted the common law definitions of those offenses declared to be crimes by the Act, and those definitions could be found only by referring to the English case law.

That the Act of 1805 included murder but not abortion is understandable. Under the law in force until then, abortion was murder. Moreover, the French-speaking inhabitants of Louisiana with little, if any, access to common law materials at that time could hardly have been expected to know that murder did not include abortion under the common law.

B. Purpose.

In *Roe* this Court discussed the possible purposes for the enactment and continued existence of criminal abortion statutes. The Court noted:

23. The *Siete Partidas*, Partida VII, Title XXXIII, Law VIII.

24. La. Acts 1805, No. 50, Sect. 33.

> "When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other state are all abortions prohibited. Despite broad proscription, *an exception always exists.* The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the amendment's command."[25]
> (Emphasis added.)

The court's statement is demonstrably incorrect insofar as it asserts that all states have provided in their abortion law an exception for the health of the mother. As is clear from a reading of the present statute,[26] the original statute,[27] and the law existing until 1805,[28] no exception has ever existed in Louisiana. Nor have the Louisiana courts read in an exception as has been done in other states.[29] Moreover, the lack of an exception was clearly intended and not a matter of oversight.[30]

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25. 410 U.S. at 157, ftn. 54.

26. La. R.S.: 14:87 reads

> Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:
>
> (1) Administration of any drug, potion,or any other substance to a female; or
>
> (2) Use of any instrument or any other means whatsoever on a female.
>
> Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years.

27. See footnote 18.

28. See text related to footnote 19.

However, the Court's reasoning that an exception for the health of the mother negates the argument of the "personhood" of the fetus is sound. Contrariwise, Louisiana's intentional rejection of an exception for the life of the mother supports the idea that the purpose of the statute is to protect potential life.

Note we are *not* here arguing that the unborn child is a "Fourteenth Amendment person" in Louisiana, while not so in other states. Nor are we asking this Court to "resolve the difficult question of when life begins . . [w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus,. . ."[31] Our purpose in reviewing the history and purpose of Louisiana's criminal abortion statute has been to demonstrate that Louisiana is not here simply "adopting one theory of law,"[32] nor suddenly attempting to define the unborn as a

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29. In *Rosen* I, 318 F.Supp. 1225 (1970) the three-judge court construed *in par. materia* 1) the Louisiana Medical Practices Act, La. RS. 37:1285 quoted in footnote 2, *supra,* which did exempt a doctor from loss of his medical license when an abortion was performed to save the life of the mother and the criminal abortion statute, La. R.S. 14:87. However, the court had no state authority to rely on. Moreover, the court could not have been aware of the possible significance of a lack of an exception at the time of that opinion which pre-dated *Roe.*

30. *See* C.J. Morrow, 17 Tulane Law Review at 21 (Sept. 1942).

31. 410 U.S. at 159.

32. *Id* at 162.

"person."[33] Rather, we are laying the foundation for the interrelationship of the criminal abortion law and Louisiana's private law which constitutes Louisiana's unique "compelling interest".

C. Compelling Interest

Unlike the common law,[34] the civil law does endorse a theory of life in areas other than criminal abortion. Louisiana's law of Persons, Book I, Title I, of the Civil Code, sets forth "the distinction of persons." From the eighteen articles in this title especially, and also from other groups of articles in the Civil Code, it can be demonstrated upon a plenary hearing that Louisiana's Civil Code has for 200 years recognized the unborn as a person capable of owning rights, as did Roman law.

In Louisiana and the civil law tradition, "[t]he law of persons represents something of an intrusion by the public law into the domain of the private."[35] This connection between the private law and the public law can actually be traced in the area of abortion simply by consulting the sources for Article 29 of Louisiana's Civil Code.

Domat, the 17th Century French jurist and authority on Roman law, is one of the primary sources for Title I, Book I, of Louisiana's law of persons.[36] In the following quotation,

33. Compare recently enacted statutes in Wisconsin and Connecticut. *Id* at 158, n. 55.

34. 410 U.S. at 161.

35. Tucker, Thomas W., "Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes," 44 Tul. L. R. 264 (1970).

36. *Id.*

37. L.S.A. - C.C. Arts. 28 and 29.

which is a source for Article 29 of Louisiana's Civil Code,[37] Domat states what is the Roman law regarding "personhood" and abortion. (In order to realize the weight that should be given Domat's statements, one must understand that in the civilian tradition the "jurist", who is not a judge but a legal scholar, carries more authority than does "case law" in the Anglo-American legal tradition):

> "*Children who are still in their Mother's Womb, have not their State determined;* neither ought it to be, but by the birth. And till they are born they cannot be reckoned in the Number of Children; not even for the Benefit of their Fathers, in order to procure to them the Rights and Advantages which accrue to Parents by the Number of their Children. *But the Hopes that they will be born alive, make them to be considered, in whatever concerns themselves, as if they were already born.* Thus, the Inheritances which fell to them before their Birth, and which belong to them, are kept for them; and Curators are assigned to them, to take care of these Inheritances for their Behoof. *Thus, the Mother who procures her own Abortion, is punished as a Murderer.*'[38] (Emphasis added).

37. L.S.A.- C.C. Arts 28 and 29

"Art. 28. Children born dead are considered as if they had never been born or conceived."

"Art. 29. Children in the mother's womb are considered *in whatever relates to themselves,* as if they were already born; thus the inheritances which devolve to them before their birth, and which may belong to them are kept for them, and curators are assigned to take care of their estates for their benefit." (Emphasis added)

38. J. Domat, *The Civil Law in Its Natural Order,* Vol. 1, Part 1, Prel. Book I, Titl. 2, Sec. 1, Law 6, p. 10 (Strahan Transl. 1837).

This quotation from Domat together with the Louisiana criminal statute existing until 1805, declaring that abortion was murder[39], are the sources for the very important Article 29 of Louisiana's Civil Code.[40]

As stated in *Cooper v. Blanck*, 39 So. 2d 352 (La. App. 1923), which made Louisiana the first state in the Union to allow recovery for prenatal injuries to a child,

> ". . .*under our system of law the foetus is constantly referred to as a 'child.'* Certain property rights are acquired at the moment of conception, but a viable foetus capable of sustaining independent existence must, it seems to us, in the contemplation of the Civil Law, at least, be regarded as a child for the negligent killing of which an action can be maintained.
>
> " 'Life', said Blackstone, 'begins, in contemplation of the law, as soon as the infant is able to stir in its mother's womb.' *If the Common Law decisions are uniformly opposed to this view, or if, as was said in the majority opinion in ALLAIRE V. ST. LUKE'S HOSPITAL, the doctrine of the Civil Law and Ecclesiastical law has not been indulged in the Courts of the Common law, we cannot follow them in the application of principles of our law, which while it presents many analogies, is yet a distinct system.*" 39 So. 2d at 358. (Emphasis added).

Moreover, unlike the common law, the civilian-Roman tradition and methodology, involves

39. *See* text corresponding to footnote 19.

40. deLavergne Volume: The Digest of the Civil Laws Now Enforced in the Territory of Orleans (1808) With Louis Moreau-Lislet's Source notes.

> ". . . The concept of 'code' and the spirit that pervades it emerge[s] to provide the intellectual mechanism. That is like the framework of a building, the weakness of which would cause the building to fall."[41]

In a plenary hearing, we seek to demonstrate that this same civilian principal applies as between Louisiana's private law of persons and the criminal law of abortion. Although crimes have been defined in Louisiana in terms of the common law, the criminal law is,like all law in Louisiana, codified law. We contend that Louisiana has a "compelling interest" in maintaining its no-exception criminal abortion statute as the public protection for the civilian concept of "personhood" as applied to the unborn.

Louisiana's unique position as the nation's only civil law jurisdiction has often set it apart on legal issues. The Supreme Court has in the past, to the extent consistent with the Supremacy Clause, permitted Louisiana to remain an "oddity" as it were.[42]

41. A. Levasseur, "On the Structure of a Civil Code," 44 Tul. L. Rev. 693, 700 (1970).'

42. The following will suffice to illustrate the willingness of the Supreme Court to permit Louisiana to regulate its internal affairs: (1) appropriation of land for levee purposes upheld, contrary to argument for common law principle of taking by ex-propriation, *Eldridge v. Trezevant*, 160 U.S. 452, (1896); (2) the principle of "forced heirship," unique to Louisiana alone among the States of the Union, and contrary to the sacred common law right to freedom of territory, although never questioned judicially, upheld by implication in many cases, *e.g., Bel V. United States*, 310 F.Supp. 1189 (WD. La. 1970), *aff'd. in part, remanded in part*, 452 F.2d 683 (5th Cir. 1971), *cert. den.*, 406 U.S. 919 (1972); and (3) unequal treatment for illegitimates under Louisiana's Succession law upheld, *Labine v. Vincent*, 401 U.S. 532 (1971). The manner in which husband and wife were each taxed in Louisiana for one-half of the community of acquets and gains was upheld and even followed by the rest of the United States, which eventually adopted legislation on marital deductions in 1948 [Sec. 612 (e) (1) (23 U.S.C. Sec. 2056 of Internal Rev. Code of 1954)] to equalize

We reiterate that we are *not* here arguing that the unborn is a "Fourteenth Amendment person" in Louisiana, while not so in other states. Rather, we assert that the unborn is a civilian "person" under Louisiana law, which law merely coincides with over two thousand years of Roman-civil law tradition.

> But must not this Court over-rule or substantially modify *Roe's* explicit recognition of a womans right to privacy in order to uphold the constitutinality of Louisiana's criminal abortion statute? We urge that a careful reading of Roe "in context" reveals sufficient flexibility to accomodate a Louisiana exception.

As this Court recently reaffirmed in *Planned Parenthood of Central Missouri v. Danforth,* U.S. (19 Cr. L.R. 3225, 3228, June 30, 1976), the right to abortion is not absolute.[43] It is "inherently different" from other aspects of the constitutional right to privacy.[44] The right is qualified by "compelling state interests."[45]

It is evident from *Roe and Planned Parenthood* that the points at which these "compelling interests" intervene are inherently unstable.

(Footnote 42 - continued from previous page.)
tax treatment between community property and non-community property states, which were in the great majority. See *U.S. v. Stapf,* 375 U.S. 118, (1963); and *Northeastern Pennsylvania Nat. B & T Co. v. U.S.,* 387 U.S. 213, 221, 87 (1967).

43. 410 U.S. at 153; 19 Cr. L.R. at 3228.

44. 410 U.S. at 159.

45. 410 U.S. at 154; 19 Cr. L.R. at 3228.

That is to say, the Court has set the intervention of the State interest in the health of the mother at the end of the first trimester "*in light of present medical knowledge.*"[47] Further, the Court said that a state's interest in "potential" life begins at "viability", by which is meant "potentially able to live outside the mother's womb, *albeit with artificial aid.*"[48]

Obviously, the settings for these two compelling interests are not sacrosanct. First of all, the point of "viability" was "purposefully left flexible for professional determination and dependent upon developing medical skill and technical ability."[49] Likewise, as to the interest in material health what if medical science discovers that any early pregnancy abortions cause some as-yet unknown medical threat to the mother's life? Suppose scientific advances make it possible for the unborn to survive outside the womb immediately after conception "albeit with artificial aid?" Faced with such new facts, by implication from its own reasoning in *Roe and Planned Parenthood,* this Court would recognize that the State's compelling interests to intervene at conception.

We urge that Louisiana, and Louisiana alone at this time under *Roe,* can demonstrate factually a compelling state interest that initiates at conception.

But could the law ever permit such inequality that a woman's right-to-privacy/right-to-abort would depend upon what the state of the Union in which she happened to find herself? We answer simply that *Roe* explicitly endorses that very sort of inequality. For after viability, the State may, *but*

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46. 410 U.S. at 163; 19 Cr. L.R. at 3228.
47. Id.
48. 410 U.S. at 160; 19 Cr. L.R. at 3228.
49. 19 Cr. L.R. at 3229.

is not required to, prohibit abortion.[50] Obviously, therefore, during the last stage of pregnancy a woman's right to abort will definitely depend upon whether the state of the Union in which she happens to be has elected to protect potential life.

CONCLUSION

It is submitted that the district should have recognized that Louisiana has a legitimate and compelling state interest which supports the constitutionality of its criminal abortion statutes. We believe that the questions presented by this appeal are substantial and that they are of public importance.

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50. 410 U.S. at 163-164.

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CERTIFICATE

I HEREBY CERTIFY that copies of the foregoing jurisdictional statement have been served upon all counsel by depositing same in the United States mail, postage prepaid, this 15th day of July, 1976.

Louis M. Jones
LOUIS M. JONES

APPENDIX I

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: Jan 26, 1976

LINDA FAY WEEKS, WIFE OF GARY ALBERT RAIMER AND GARY ALBERT RAIMER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED — CIVIL ACTION

versus

HON. HARRY CONNICK, DISTRICT ATTORNEY OF THE PARISH OF ORLEANS; HON. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA AND DR. WILLIAM H. STEWART, DIRECTOR HEALTH AND HUMAN RESOURCES ADMINISTRATION — NO. 73-469, SECTION "F"

CALVIN JACKSON, M.D. and DELTA WOMEN'S CLINIC, INC. — CIVIL ACTION

versus

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS; HARRY CONNICK, DISTRICT ATTORNEY; WILLIAM H. STEWART, M.D., HEALTH AND HUMAN RESOURCES ADMINISTRATION, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES — NO. 74-2425, SECTION "F"

MOTHER DOE, INDIVIDUALLY AND ON BEHALF OF HER MINOR DAUGHTER, JANE DOE, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED — CIVIL ACTION

versus

WILLIAM H. STEWART, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE STATE OF LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION; AND GARLAND L. BONIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF FAMILY SERVICES OF THE STATE OF LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION — NO. 74-3197, SECTION "F"

LADY JANE, ON BEHALF OF MARY JANE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED — CIVIL ACTION

versus

HON. HARRY CONNICK, DISTRICT ATTORNEY OF THE PARISH OF ORLEANS; HON. WILLIAM J. GUSTE, ATTORNEY GENERAL OF THE STATE OF LOUISIANA; WILLIAM H. STEWART, M.D., COMMISSIONER OF THE LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION; AND LEE FRAZIER, ADMINISTRATOR, CHARITY HOSPITAL OF LOUISIANA — NO. 75-474, SECTION "F" (CONSOLIDATED CASES)

These consolidated cases, all brought under 42 U.S.C. § 1983, challenge the constitutionality of certain Louisiana Abortion Statutes and state regulations and policies pertaining to Medicaid payments and public hospital facilities for abortions. This three-judge district court was convened to consider the issues raised by these complaints and a hearing was held on the merits.

RAIMER V. CONNICK - No. 73-469

This suit was instituted by plaintiff, Linda Weeks Raimer, who, at the time of suit was approximately 8 to 10 weeks pregnant, indigent, married and living with her husband, Gary Raimer. While an emergency in-patient at Charity Hospital of Louisiana at New Orleans, she was advised by two physicians at the hospital that to carry her pregnancy to term posed a serious threat to her mental and physical health. When her request for an abortion was denied by the OB/GYN Department of Charity Hospital, Mr. and Mrs. Raimer brought this class action for declaratory and injunctive relief challenging the constitutionality of certain criminal statutes of Louisiana, namely La. R.S. 14:87, pertaining to the crime of abortion, and La. R.S. 14:88, pertaining to the distribution of abortifacients, as violative of their rights under the First, Fourth, Ninth and Fourteenth Amendments of the U. S. Constitution.

Plaintiffs also seek injunctive relief, requiring that state hospital facilities be made available for abortion services.

The Federation of Registered Professional and Licensed Practical Nurses of Charity Hospital at New Orleans, the Louisiana State Board of Medical Examiners and the Louisiana State Medical Society were permitted to intervene as amicus curiae.

Under the discretionary powers granted under Rule 42 of the Federal Rules of Civil Procedure, we denied the motion of defendant, Harry Connick, District Attorney for the Parish of Orleans, for a separate trial as to the issues of the constitutionality of La. R.S. 14:87 and 14:88 from the other issues presented. We also took under consideration the motion of defendants to dismiss plaintiffs' complaint for lack of standing. The evidence shows that plaintiff, Mrs. Linda Weeks Raimer, entered Charity Hospital as an emergency patient suffering from a self-inflicted overdose of drugs allegedly to bring about an abortion. At that time, she was in the first trimester of pregnancy. Dr. Keyes of the Psychiatric Department and Dr. Butler of the Department of Medicine recommended an abortion. Although Mrs. Raimer requested an abortion, the OB-GYN Department denied her request on the ground that there was no medical reason therefor . Mrs. Raimer was discharged from Charity on February 15, 1973. Shortly thereafter she obtained an abortion in Washington, D.C.

Defendants contend that since Mrs. Raimer had an abortion prior to institution of suit, she was a non-pregnant female who has no standing to challenge the abortion statutes and policies of Louisiana.

This suit was filed before Mrs. Raimer obtained an abortion.[1] At the time plaintiff requested an abortion, she was pregnant; after her request was denied by Charity, she obtained one out of state.

Defendants next contend that plaintiffs have no standing because Mrs. Raimer had no attending physician requesting the use of Charity Hospital facilities to perform the abortion.

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1. Deposition of Gary Raimer, P. 22.

However, the evidence shows that a psychiatrist and intern at Charity recommended that Mrs. Raimer have an abortion but that she was refused by the OB/GYN Department. At the time Mrs. Raimer requested an abortion, it was a criminal offense in Louisiana for anyone to perform this procedure.

Defendants also contend that plaintiffs have no standing to challenge the policies at Charity Hospital because they are not indigent, destitute or poor.

Under La. R.S. 46:6, although the Board of Administrators of state-supported hospitals must accept emergency patients whatever their financial status, they have a duty to refuse admission to any person not poor and destitute.

At the time Mrs. Raimer requested an abortion, she was not working, her husband had not worked for over a year and was on public welfare.

Under the above circumstances we find that Mrs. Raimer, a pregnant woman who sought an abortion, has standing to challenge these statutes and policies. Her right to obtain an abortion or to receive and use abortifacients is adversely affected by the statutes and policies in question, thus there is a nexus between the statutes asserted by Mrs. Raimer and the claims she presents. Plaintiff has a personal stake in the outcome sufficient to insure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[2]

Defendants' motion to dismiss is therefore denied.

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2. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942 (1968); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973); Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739 (1973); Doe v. Poelker, 497 F.2d 1063 (C.A. 8-1975) app. after rem. 515 F.2d 541; Doe v. Scott, 321 F.S. 1385 (N.D. Ill. 1971) vac. Hanrahan v. Doe, 410 U.S. 950, 93 S.Ct. 1410 (1973).

La. R.S. 14:87 and 14:88 are challenged by plaintiffs as an unconstitutionally overbroad state interference in women's right of privacy in the abortion decision.

The wording of these Louisiana statutes encompasses abortions performed by licensed physicians or the distribution or sale of abortifacients by licensed physicians and druggists of any medication or device for the purpose of procuring an abortion. Enforcement of these criminal statutes would make it impossible for any physician to perform or any woman to obtain an abortion for any reason at any time during her pregnancy regardless of the trimester.

La. R.S. 14:87 is a blanket criminal prohibition of the performance of all abortions, even those performed to preserve the life or health of the mother. It reads in pertinent part as follows:

> Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:
>
> (1) Administration of any drug, potion, or any other substance to a female; or
>
> (2) Use of any instrument or any other means whatsoever on a female.
>
> . . . .

The right of a pregnant woman to choose, in consultation with her physician, to terminate her pregnancy and the attendant right of the physician to perform abortions has been thoroughly discussed by the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739 (1974), where state criminal statutes interfering with these rights were held unconstitutional.

Although the language in the Louisiana statutes differs somewhat and is more restrictive than the Texas and Georgia

statutes, the substance is essentially identical.

On the basis of the Supreme Court's decisions in *Roe* and *Doe*, La. R.S. 14:87 is therefore unconstitutional.

La. R.S. 14:88, also a criminal statute, reads in pertinent part as follows:

> Distribution of abortifacients is the intentional:
>
> (1) Distribution or advertisement for distribution of any drug, potion, instrument, or article for the purpose of procuring an abortion; or
>
> (2) Publication of any advertisement or account of any secret drug or nostrum purporting to be exclusively for the use of females, for preventing conception or producing abortion or miscarriage.
>
> . . . .

La. R.S. 14:88 (1) thus would prohibit such acts as the original sale of medical instruments or other articles to doctors who wish to perform abortions, and their distribution by a doctor or druggist to his patient or customer. The statute contains no exceptions for abortions necessary to save the mother's life nor does it differentiate between the stages of pregnancy as does the Supreme Court's decisions in *Roe* and *Doe*.

Thus on the authority of the Supreme Court decisions in *Roe* and *Doe*, La. R.S. 14:88(1) is unconstitutionally overly broad.

La. R.S. 14:88(1) also prohibits the advertisement for distribution of any drug, portion, instrument, etc.,and section (2) prohibits the publication of any advertisement or account of any secret drug or nostrum to be used for

producing abortion. These provisions relating to advertisement are likewise overly broad and unconstitutional under the authority of the recent Supreme Court decision in Bigelow v. Virginia, U.S. , 95 S.Ct. 2222 (1975), in which the Court annulled the misdemeanor conviction of a Virginia newspaper editor who had violated a Virginia statute prohibiting the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The newspaper had published an advertisement relative to the availability of abortions in the State of New York. The Supreme Court held that the Virginia statute prohibiting publication of the advertisement in question unconstitutionally infringed upon the newspaper editor's First Amendment rights. For the reasons expressed by the Supreme Court in *Bigelow*, the advertisement prohibited in the Louisiana statutes likewise infringes upon First Amendment rights and is unconstitutional.

Plaintiffs attack the constitutionality of the abortion policy at Charity Hospital of Louisiana in New Orleans under the 14th Amendment to the U.S. Constitution.

Charity Hospitals of Louisiana are public hospitals created by the State Legislature, primarily founded to treat the medical ills of the poor, destitute or emergency patients.[3] They are supported by state funds, under the administrative and regulatory authority of the Louisiana Health and Human Resources Administration (HHRA).[4]

The OB/GYN department at Charity Hospital in New Orleans is divided between the Tulane and LSU Medical Schools. Physicians are employed by the respective medical schools, some of whom give their services free to the hospital.

On March 16, 1973, Dr. Charles C. Mary, Jr., then Com-

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3. La. R.S. 46:5.
4. La. R.S. 46:1751 *et. seq.*

missioner of the Louisiana Health & Social Rehabilitation Services Administration, issued a statement on the *Roe* and *Doe* decisions of the Supreme Court. Speaking in his official capacity, Dr. Mary stated that the Administration would not allow any actions that destroy human life. Sometime thereafter Dr. Mary resigned his position and the Louisiana Health & Social Rehabilitation Services Administration was incorporated into the Louisiana Health and Human Resources Administration.

Since July 14, 1974, however, the Statement of Admission Policy for Charity Hospital of Louisiana at New Orleans reads as follows:

> That since the final judgment in Louisiana State Board of Medical Examiners vs. Guste (Rosen) No. 74-380, July 14, 1974, Charity Hospital of Louisiana at New Orleans has had no affirmative policy pro or con with respect to abortions but has operated all its services as follows:
>
> All patients with medical and surgical problems are evaluated by a house officer and/or a staff physician. All medical services are provided through the faculty, staff and students of the Louisiana State University Medical School or the Tulane University Medical School.
>
> The appropriate therapy for any patient presenting himself or herself at Charity Hospital of Louisiana in New Orleans is designed by the house officer and staff physician for what, in the individual physician's judgment, is in the best medical interest of the patient. In case of pregnancy, if a patient appears at the emergency room with complaint of pregnancy, she is seen by a physician. If pregnancy is confirmed by appropriate tests, she is referred to the Tulane or LSU OB Clinic, depending upon which school is rendering the service at the time she may present herself. If abortion is requested, she is evaluated as any other pregnant patient and appropriate therapy is recommended following staff physician evaluation. No house officer or staff physician is prohibited or compelled to perform an abortion and the same policy is applied to supportive staff.

Therapeutic abortions, hystorectomies, and sterilizations are performed at Charity. Although pregnant women have sought elective abortions, none has been performed.

Plaintiffs' contention that Charity Hospital of New Orleans has a silent policy among those in authority that elective abortions are prohibited is not borne by the evidence.

What the evidence did show was that the July 14, 1974, policy statement was never disseminated to the Directors, staff, or other personnel employed by or at or in training at Charity Hospital of New Orleans and although most employees knew of Dr. Mary's statement, the majority of persons employed at the OB/GYN Clinic were unaware of the state's current written policy.[5]

Although there was some testimony adduced at the hearing that particular doctors told their patients they did not perform abortions, no evidence was introduced to show that under current hospital policy all physicians employed at Charity would refuse to perform abortions.

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5. Testimony of Dr. Lee Frazier, Director of Charity Hospital; Dr. Harry Dascom, Medical Director of Charity Hospital; Dr. Abe Mikal, Chairman, OB-GYN Dept. LSU Medical School; Dr. Jason Collins, Chairman, OB-GYN Dept., Tulane University Medical School, Dr. Rudolph Jacobs, Resident, OB-GYN Dept., Charity Hospital.

Therefore, we hold that the written policy of Charity Hospital of New Orleans is constitutionally adequate to fit the medical needs and necessities of the mental and physical health of the patient. Defendants are to take positive steps to disseminate the written policy of July 14, 1974,to all physicians, house officers, and other personnel employed at Charity Hospital of Louisiana in New Orleans. However, those doctors, nurses and other personnel who work at Charity and who have moral and religious convictions against the performance of abortions are not required to participate in their performance.

JACKSON, ET. AL. VS. GUSTE, ET. AL. - No. 74-2425

Plaintiff, Dr. Calvin Jackson, is a physician, licensed to practice medicine in the State of Louisiana. On August 31, 1974, Dr. Jackson contracted to use the facilities, equipment, supplies and administrative personnel and services of plaintiff, Delta Women's Clinic, Inc., to perform first trimester abortions.

Plaintiffs, contending they have in the past and expect in the future to be harassed by state court prosecutions, instituted this action for monetary damages, declaratory and injunctive relief challenging the constitutionality of La. R.S. 14:87, pertaining to the crime of abortion; La. R.S. 14:87.4, pertaining to the crime of abortion advertising; La. R.S. 40:1299.33(D), the abortion consent statute; and La. R.S. 40:1299.34 the abortion counseling statute. Additionally, plaintffs attack Louisiana's abortion policies in connection with its Medicaid program and Charity Hospital of Louisiana in New Orleans as violative of their rights under the First and Fourteenth Amendments to the U.S. Constitution and the Social Security Act, 12 USC 1396 *et seq.*

Under Rule 42 of the Federal Rules of Civil Procedure, we granted plaintiffs' motion to sever the damage portion of this action from the constitutional issues, to be heard by a single

judge at a later date. We also took under consideration motion of defendants to dismiss plaintiffs' complaint.

The original ground for dismissal advanced by the State of Louisiana is the abstention doctrine because of a pending Louisiana state court proceeding against plaintiffs. The state suit, Civil Action No. 575-902, of the Civil District Court for the Parish of Orleans, Louisiana, was filed in July 1974 by Attorney General Guste against Delta Women's Clinic, Inc. to enjoin the corporation from performing abortions without a medical license in violation of the Louisiana Medical Practices Act, La. R.S. 12:901 *et seq.* On August 21, 1974, after three days of trial, the State Court issued a permanent injunction against the corporation prohibiting it from practicing medicine without a license. Delta Women's Clinic, Inc. was the sole defendant in this State action, and did not appeal the judgment or go forward with its reconventional demand. The corporation was dissolved shortly thereafter and Dr. Calvin Jackson, a former employee of the corporation, continued to perform abortions in the facilities formerly used by Delta. Dr. Jackson was not a party in the State Court litigation and thus the abstention doctrine of Younger v. Harris[6] is not applicable under the circumstances of this case. Furthermore, the dissolution of Delta Women's Clinic, Inc. abates any legal action initiated by and against it.[7] Therefore, the motion to dismiss this action based on abstention is denied.

The second ground urged by defendants is the absence of a case or controversy necessary for federal jurisdiction under Article III of the Constitution. Defendants contend that since there is no genuine threat of enforcement of prosecution of Dr. Jackson by state officials there exists no actual justiciable controversy. Since the Supreme Court in *Doe v.*

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6. 401 U.S. 37, 91 S.Ct. 746 (1971).

7. Oklahoma Natural Gas Co. v. State of Oklahoma, 273 U.S. 257, 47 S.Ct. 391 (1927) and authorities cited therein.

Bolton[8] has decided this identical question, i.e. that a physician should not be required to await and undergo a criminal prosecution before he can seek relief, we find that Dr. Jackson's suit presents a justiciable controversy and that he has standing to bring it. Defendants' motion to dismiss Dr. Jackson's suit is denied.

However, defendants' motion to dismiss Delta Women's Clinic, Inc. is based on the grounds that there is no case or controversy existing between it and defendants. It is elemental that there must be parties before there is a case or controversy[9] and since Delta has been dissolved, the motion to dismiss must be granted.

Additionally we find that Dr. Jackson has standing to challenge La. R.S. 14:87, and the Charity Hospital abortion policies, heretofore disposed of in Raimer v. Connick, and Louisiana's Medicaid Program [10] hereinafter discussed.

Dr. Jackson attacks Louisiana's anti-abortion advertising and counseling statutes (La. R.S. 14:87.4 and La. R.S. 40: 1299.34) as an overly broad patent infringement of his and his patients' constitutional guarantees of free speech and their rights of privacy under the First, Fourth, Ninth and Fourteenth Amendments to the U.S. Constitution.

The statutes in question prohibit Dr. Jackson from advertising or publicizing his services and others are prohibited

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8. 410 U.S. 179 at 188, 93 S.Ct. 739 at 745 (1974).

9. Ellis v. Dyson, U.S. , 95 S. Ct. 1691 (1975).

10. Doe v. Bolton, *supra;* Griswold v. Conn., 381 U.S. 479, 85 S.Ct. 1678 (1965); Nyberg v. City of Virginia, 361 F.S. 932 (D.C. Minn. 1973) aff'd. 495 F.2d 1342 (CA 8-1973) app. dis. 419 U.S. 891, 95 S.Ct. 169 (1974); Wulff v. Singleton, 508 F.2d 1211 (C.A. 8-1974), writs granted, U.S. , S.Ct. (May 23, 1975); Doe v. Scott, *supra.*

from recommending his services, thus affecting his medical practice and the rights of his patients by restricting information concerning the availability of abortion services.

The Supreme Court consistently has permitted attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. Thus, plaintiff has standing to test the constitutionality of the statutes in question.[11]

La. R.S. 14:87.4, a criminal statute, reads in pertinent part as follows:

> Abortion advertising is the placing or carrying of any advertisement of abortion services by the publicizing of the availability of abortion services.
>
> . . . .

This statute which prohibits any person from publicizing the availability of abortion services is broad enough to encompass virtually any mention to any person that abortion services are legal and available.

Therefore, under the recent Supreme Court decision of Bigelow v. Va., supra, we declare La. R.S. 14:87.4 unconstitutional for the same reasons expressed heretofore in the case of Raimer v. Connick, supra, wherein we declared unconstitutional the advertising provisions of La. R.S. 14:88(1).

La. R.S. 40:1299.34 reads as follows:

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11. Bigelow v. Commonwealth of Va., U.S. 95 S.Ct. 222 (1975); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1964); Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116 (1965); Griswold v. Conn., *supra;* Abele v. Markle, 452 F.2d 1121 (CA 2-1971) on rem. 342 F.S. 800 (D. Conn. 1972); Planned Parenthood Assn. v. Fitzpatrick, 401 F.S. 554 (E.D. Pa. 1975).

> No person employed by the State of Louisiana, by contract or otherwise, or of any subdivision or agency thereof, and no person employed in any public or private social service agency, by contract or otherwise, including workers therein, which is a recipient of any form of governmental assistance, shall (require) or recommend that any woman have an abortion. Notwithstanding anything contained herein to the contrary, this section shall not apply to a doctor of medicine, currently licensed under the provisions of the Louisiana Medical Practices Act (R.S. 37:1261. et seq.) who is acting to save or preserve the life of a pregnant woman.

The anti-abortion counseling statute prohibits state employees or employees of any agency receiving governmental assistance from recommending an abortion regardless of the circumstances. Included in the definition of "governmental assistance" are federal, state and local grants, loans or other financial aid. (La. R.S. 40:1299.33). Licensed physicians are exempt from the prohibition only if they are acting to save or preserve the life of the mother.

The fundamental right of freedom of speech includes not only the right to utter but the right to receive and distribute information and ideas, the right of freedom of inquiry and thought, and the liberty to discuss openly all matters of public concern without previous restraint or fear of punishment.[12]

> "The constitutional guarantee of free speech extends to more than abstract discussion unrelated to action, but free trade in ideas also means free

12. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 (1969); Griswold v. Conn., *supra;* Ginzburg v. U.S., 383 U.S. 463, 86 S.Ct. 942 (1966); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972).

> trade and the opportunity to persuade to action not merely to describe facts." Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315 (1945).

Not all forms of speech are granted First Amendment protection;[13] persons employed by the government have the right to speak as they will, however, the State may limit their right of free speech if it is essential to the integrity of the public service and if the infringement is limited to the necessities of the situation.[14]

State statutes affecting free expression protected by the First Amendment must meet the requirements of specificity and overbreadth.

Plaintiffs contend the word "recommend," as used in the statute, is unconstitutionally vague. To "recommend" is to present as one's choice for something or to mention as being worthy of acceptance or having one's approval.[15] We find that "recommend" given its normal meaning and common understanding is not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.[16]

13. Chaplinsky v. N.H., 315 U.S. 568, 62 S.Ct. 766 (1942) (fighting words); Roth v. U.S., 354 U.S. 476, 77 S.Ct. 1304 (1957) (obscenity); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974) (libel); Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 (1969) (incitement).

14. Pickering v. Bd. of Ed., 391 U.S. 563, 88 S.Ct. 1731 (1968); United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556 (1947); U.S. v. Marchette, 466 F.2d 1309 (CA 4-1972) cert. den. 409 U.S. 1063, 93 S.Ct. 553 (1972).

15. Webster's New International Dictionary, 3d Ed. Unabridged, p. 1897.

16. Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1241 (1974); U.S. v. Vutich, 402 U.S. 62, 91 S.Ct. 1294 (1974); Abele v. Markle, *supra.*

The constitutional guarantee of privacy in the abortion decision includes the doctor's right to discuss the advantages and disadvantages of abortion and to advise his patient concerning this choice. Speech is therefore an essential ingredient to the effective and intelligent decision of pregnant women involving the right of a doctor and his patent to talk together freely.

The deterrent effects of this statute are real and substantial It prohibits all state employed physicians from recommending an abortion regardless of the stage of pregnancy and regardless of the health of the mother. It prevents at all stages of pregnancy, women from seeking and doctors from offering to perform abortions. It not only limits the ability of Louisiana residents to receive and dispense information, but places a prior restraint upon the physician's right to speak and the rights of the patient to hear what he has to say. A statute authorizing previous restraint upon the exercise of a guaranteed freedom, and which sweeps within its broad scope, activities that are protected speech is unconstititonal.[17]

Plaintiff challenges the constitutionality of La. R.S. 40: 1299.33 (D), which requires that the "parents" of an unmarried minor give written consent prior to the performance of an abortion.

La. R.S. 40:1299.33(D) reads as follows:

> No abortion shall be performed on any woman unless prior to the abortion she shall have been advised, orally and in writing, that she is not required

17. Griswold v. Conn.,*supra;* Bigelow v. Va., *supra;* Assoc. Student U. of Calif at Riverside v. Atty. Gen., 368 F.S. 11 (C.D. Cal. 1973); Leigh v. Olsen, 385 F.S. 255 (D. N.D. 1974); Mitchell Family Planning v. City of Royal Oak; 335 F.S. 738 (E.D. Mich. 1972); NAACP Alabama, 377 U.S. 288 at 307, 84 S.Ct. 1302 (1964); Erznoznik v. City of Jacksonville, U.S. , 95 S.Ct. 2268 (1975).

> to submit to the abortion and that she may refuse any abortion for any reason and without explanation and that she shall not be deprived of any governmental assistance of any other kind of benefits for refusing to submit to an abortion. This provision shall be of full force and effect notwithstanding the fact that the woman in question is a minor, in which event said minor's parents or if a minor emancipated by marriage, the minor's husband, shall also be fully advised of their right to refuse an abortion for the minor in the same manner as the minor is advised. Compliance with this provision shall be evidenced by the written consent of the woman that she submits to the abortion voluntarily and of her own free will, and by written consent of her parents, if she is an unmarried minor, and by consent of her husband if she is a minor emancipated by marriage, such written consent to set forth the written advice given and the written consent and acknowledgment that a full explanation of the abortion procedure to be performed has been given and is understood.

The statute applies directly to a physician's activities by limiting the abortions he can legally perform and restricts his right to practice medicine, resulting in financial loss.

Thus, we find that Dr. Calvin Jackson as a licensed physician who daily performs abortions, has standing to challenge the constitutionality of this statute.[18]

The Fifth Circuit has foreclosed this subject by its recent decision in Poe v. Gerstein, 517 F.2d 787 (C.A. 5 1975), in which it held that the fundamental right to an abortion applies to minors as well as to adults and that both the parental

18. Poe v. Gerstein, 376 F.S. 695 (S.D. Fla. 1973), app. dis. and cert. den. 417 U.S. 279, 94 S.Ct. 2246 (1974); Wolfe v. Schoering, 388 F.S. 631 (W.D. Ky. 1974).

and spousal consent requirements of a Florida statute, similar to the Louisiana statute involved here, were unconstitutional.

We are bound by that decision as a controlling precedent and for the reasons expressed by the Fifth Circuit in that case. Thus, we hold La. R.S. 40:1299.33(D) unconstitutional.

Also, challenged is the constitutionality of Louisiana's Medicaid policy for the payment of abortions. Since a significant number of Dr. Jackson's patients who seek abortions are Medicaid eligible,we find that he has standing to institute this action. However, this issue will be disposed of in the opinion to follow.

MOTHER DOE ET. AL. V. STEWART, ET. AL. - No. 74-3197

Plaintiff, Jane Doe is an unmarried, pregnant, dependent minor, living with her natural mother, plaintiff Mother Doe. They are indigent recipients of Aid to Dependent children and enrollees in the joint Federal-State Medicaid Program. When plaintiffs were denied funds to procure an abortion, they instituted this class action seeking injunctive and declaratory relief, challenging Louisiana's interpretation of Title XIX of the Social Security Act and the constitutionality of Louisiana's Medicaid policy under the Ninth and Fourteenth Amendments to the United States Constitution.

We took under consideration, plaintiffs' motion to substitute Roy E. Westerfield for defendant Garland L. Bonin, a public official who was sued in his official capacity as Director of the Division of Family Services of Health and Human Resources. Since Mr. Bonin was succeeded by Mr. Westerfield effective April 7, 1975, plaintiffs' motion is granted.[19]

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19. Rule 25(d) Federal Rules of Civil Procedure.

Also pending decision is defendants' motion to dismiss plaintiffs' complaint.

Plaintiffs' counsel are NOLAC[20] attorneys who have instituted this action to procure Medicaid payments for non-therapeutic abortions.

Defendants moved to dismiss this suit on grounds that the new Legal Assistance Act prohibits such suits by federally funded corporations.

On July 25, 1974, the Legal Services Corporation was established by the Legal Services Corporation Act of 1974[21] which was specifically designed to transfer the legal services program to it from the Office of Economic Opportunity (EOC). Under the Act no funds of the corporation may be used to provide legal assistance for any proceeding to procure a non-therapeutic abortion.[22]

Appropriations under the Legal Services Corporation Act are not available until six or more members of the Corporation's Board have been appointed by the President and confirmed by the Senate. As of May 27, 1975, the Corporation's Board had not taken such action. Furthermore, transfer of the legal services program from the Office of EOC is not complete until ninety days after the first meeting of the Board.

In view of the fact that NOLAC is not currently being financed by Legal Services Corporation but is still operating pursuant to the Economic Opportunity Act of 1964,[23] defendants' motion to dismiss is denied.

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20. New Orleans Legal Assistance Corporation, a federally funded agency.

21. 42 U.S.C. 2996 *et seq.*

22. 42 U.S.C. 2996f(b) (8).

23. 42 U.S.C. 2809(a) (3).

Additionally, we hold that plaintiffs' motion to certify their action as a class action is granted.

We find that the class in this case is composed of all pregnant women residing in the State of Louisiana who are indigent recipients of Aid to Dependent Children and are enrollees in the joint Federal-State Medicaid Program, and who desire or will desire abortions within the first trimester of pregnancy.

The requirements of Rule 23 are met here since the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate, declaratory relief to the class as a whole.[24]

Plaintiffs contend that Louisiana's informal policy of limiting payment for abortions under Medicaid to only those instances where abortions are necessary to save the life of the mother violate the medical assistance program of the Social Security Act and deny them equal protection under the 14th Amendment to the U.S. Constitution.

Plaintiffs attack the State's policy on both statutory and constitutional grounds, but since a three-judge court has been convened, to defer the determination of the statutory attack to a single judge would be time consuming, therefore the three-judge panel will decide the statutory claims presented.[25]

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24. Rule 23(b)(2) F.R.C.P.

25. Hagans v. Levine, 415 U.S. 528, 94 S.Ct. 1372 (1974); Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, (1970); Doe v. Westby, 383 F.S. 1143 (D.S.D. 1974) vac. & rem., U.S. , 95 S.Ct. 1385 (1974).

We find that plaintiffs, consisting of an unmarried pregnant dependent minor and her mother, who are indigent recipients of Aid to Dependent Children and enrollees in the joint Federal-State Medicaid Program, have standing to challenge state-wide regulations prohibiting the payment of funds for abortions other than to save the life of the mother.[26]

The Medical Assistance Program of the Social Security Act (Medicaid)[27] is a federal grant-in-aid project which establishes a comprehensive scheme of medical care for the needy to be administered by the states and jointly funded by the federal and state governments. Louisiana is a voluntary participant in the plan. It extends medical assistance to all recipients of Aid to Families with Dependent Children (AFDC)[28] and other needy persons.[29]

For a state to receive federal monies, its program must meet federal requirements and is obligated to provide certain minimal services, among which are in-patient and out-patient hospital services, family planning services, and physicians' services.[30]

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26. Doe v. Bolton, *supra*; Roe v. Wade, *supra;* Doe v. Wohlgemuth, 376 F.S. 173 (W.D. Pa. 1974), vac. & rem. on other grounds, 505 505 F.2d 186 (C.A. 3-1975).

27. 42 U.S.C. 1396 *et seq.*

28. 42 U.S.C. 601 *et seq.*

29. La. R.S. 46:153A reads;
"Medical assistance in the form of payment for medical care... may be provided under rules and regulations of the State Board of Public Welfare to any person who;
(1) meets the requirement for public assistance; or
(2) does not meet the requirements for public assistance, but whose income and resources are not sufficient to meet his medical needs.

30. 42 U.S.C. 1396a(a)[13) (B); 1396d(a).

Louisiana's Medicaid Policy Statement entitled "Limitation on Payment for Abortions Under Title XIV," Memorandum No. 74-84, dated June 17, 1974, issued by Garland L. Bonin to State and Parish Staffs reads as follows:

> In the State of Louisiana only therapeutic abortions are recognized as legal. The law specifically defines therapeutic as a medical condition or conditions which is "life threatening" to the pregnant woman. The diagnosis of pregnancy only is not within the framework of this definition. The law also prescribes the action and documentation necessary to the performance of an abortion. We can make payment through our medical assistance program only for an abortion done in accordance with the existing Louisiana abortion law.
>
> We have secured an opinion from the Attorney General's office that payment for elective abortions in a state where such abortions are legal is also prohibited. This means that we cannot make payment in or out of the state for an abortion except that done in accordance with existing Louisiana abortion law.

Although under Memorandum No. 74-84, Louisiana allowed reimbursement under Medicaid for only those abortions necessary to save the life of the mother, obviously since the Rosen decision,[31] Louisiana has expanded its definition of "therapeutic," to include those abortions necessary to prevent serious and permanent impairment to the physical health of the mother.[32] Additionally, Louisiana's written

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31. Rosen v. La. State Bd. of Medical Examiners, 318 F.S. 1217 (E. D. La. 1970) vac. & rem. 12 U.S. 902, 93 S.Ct. 2285, on rem. 380 F.S. 875 (1975) aff'd. U.S. , 95 S.Ct. 767.

32. See Memoranda of Authorities dated May 27, 1975, wherein Mr. Louis M. Jones, Assistant Attorney General for the State of Louisiana stated at p. 1:

(Footnote 32 continued on next page.)

policy provided payment for only those abortions done in accordance with existing Louisiana abortion law. Since we have this date declared some of those laws unconstitutional, we assume Louisiana will continue to provide payment for those abortions done in accordance with existing Louisiana abortion laws.

When Congress enacted the provisions of the Social Security Act, it was cognizant of the limitations on state resources,[33] giving the states great latitude in establishing standards for the administration of various plans under the doctrine of a "scheme of cooperative federalism."[34]

42 USC 1396 provides that the Act is:

> For the purpose of enabling each State, *as far as practicable under the conditions in each State,* to furnish (1) medical assistance on behalf of families with dependent children. . .(Emphasis supplied).

CFR 249.10(a) (5) provides that although a participating state may not arbitrarily deny medical care to an eligible individual solely because of the diagnosis or type of illness, the

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(Footnote 32 - continued from previous page)

"It is the defendants' contention that the Constitution does not impose an affirmative burden on this State to pay for elective, medically nonessential abortions, when the policy of the Louisiana Health and Human Resources Administration is to provide payments for therapeutic, medically necessary abortions. A therapeutic abortion is defined in Doe v. Rose, 499 F.2d 1112 (10th Circuit, 1974) as 'one necessary to save the life of the expectant mother or to prevent serious and permanent impairment to her physical health.' "

33. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 at p. 1158 (1970).

34. King v. Smith, 392 U.S. 309, 88 S.Ct. 2128 (1968); Doe v. Wohlgemuth, *supra* at 184.

State may place appropriate limits on services based on such criteria as "medical necessity."

When Congress enacted the Medicaid statute, non-therapeutic abortions were prohibited in all fifty states. Congressional intent to include coverage was necessarily lacking. When Congress passed the Family Planning Services and Research Act of 1970, abortion was specifically excluded as a means of family planning to be recognized under the Act.[35] In establishing the Legal Services Corporation System, Congress again provided that no funds of the corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion.[36]

Thus, in view of Congress' recognition of a State's limited resources, its attitude toward abortions and its silence on the subject, we believe that Congress did not intend that States should pay for non-medically necessary abortions as necessary medical expenses when States are not required to fund other medically non-necessary services such as elective cosmetic surgery.

Additionally, as part of a proposed rule which would increase federal participation to 90% in the area of family planning, the Department of Health, Education & Welfare, which is charged with the administration of the Social Security Act, on December 9, 1974, stated that federal matching funds would be "available for abortions when provided under the State's plan as a physician's service or otherwise."[37]

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35. 42 U.S.C. 300-a-6.

36. 42 U.S.C. 2996f(b) (8).

37. See Federal Register, December 9, 1974.

Although HEW's statement indicates that non-therapeutic abortion coverage is not prohibited by 45 USC 1396(a),it supports the argument that whether or not such abortions are covered is up to the States. See Burns v. Alcala, 420 U.S. 575, 95 S.Ct. 1180 at p. 1184, n. 5 (1975). Thus, we find Louisiana's current policy consistent with the Social Security Act.[38]

LADY JANE, ET. AL. VS. CONNICK, ET. AL. - No. 75-474

At the time suit was instituted, Mary Jane was a 15 -year old unmarried, 8 week pregnant indigent minor living with her mother. After consulting with her physician, Mary Jane requested Charity Hospital to perform an elective abortion. Upon their refusal, Mary Jane and her mother instituted a class action for damages as well as declaratory and injunctive relief attacking the constitutionality of La. R.S. 14:88

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38. Roe v. Ferguson, 515 F.2d 279 (CA6-1975); Doe v. Wohlgemuth, *supra.*

In our view, the constitutional attack would also fail for the following reasons:

In view of the fact that we are dealing here with low income status and not with a suspect classification (San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 1973, and Citizens Comm. for Faraday Woods v. Lindsay, 507 F.2d 1065, C.A. 2-1974, cert. den., U.S. , 95 S.Ct. 1679, 1975), or a basic necessity of life (Mem. Hosp. v. Maricopa Hosp., 415 U.S. 250, 94 S.Ct. 1076, 1974) and since there is no constitutional right to receive public welfare (Smith v. Reynolds, 277 F.S. 65, E.D. La. 1967, aff. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 1969) we find Louisiana's current medicaid policy of providing funds for abortions necessary to preserve the life or health of the mother rationally related to a legitimate governmental interest. (Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 1972; Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 at p. 1158, 1970; Burr v. Smith, 322 F.S. 980 D.C. Wash. 1971, aff. 404 U.S. 1027, 92 S.Ct. 717, 1971; Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 1971; United Low Income, Inc. v. Fisher, 470 F.2d 1074, C.A. 1-1972; Henry v. Betit, 323 F.S. 418, D.C. Alaska 1971; Carroll v. Finch, 326 F.S 891, D.C. Alaska; Youakim v. Miller, 374 F.S. 1204, N.D. Ill, 1974, app. pend. U.S. , 95 S.Ct. 1389, 1975).

(pertaining to the distribution of abortifacients) and the abortion policy of Charity Hospital of Louisiana in New Orleans, heretofore disposed of in Raimer vs. Connick; La. R.S. 40:1299.33(D), (the parental consent statute) and La. R.S. 40:1299.34 (the anti-abortion counseling statute) heretofore disposed of in Jackson v. Guste.

We find that plaintiffs, an unmarried pregnant minor seeking a first trimester abortion and her mother have standing to challenge these statutes.

Additionally, plaintiffs' motion to certify this action as a class action is granted.

The class is composed of all unmarried pregnant minors residing throughout the State of Louisiana who desire or will desire abortions within the first trimester of pregnancy.

The requirements of Rule 23 are met here since the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate, declaratory relief to the class as a whole.[39]

ATTORNEYS' FEES

In view of the fact that there is no evidence that any defendant acted in bad faith, vexatiously, wantonly or for oppressive reasons, plaintiffs' requests for attorneys' fees are denied.[40]

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39. Rule 23(b) (2) F.R.C.P.; Coe v. Gerstein, *supra;* Doe v. Mundy, 378 F.S. 731 (E.D. Wis. 1974) aff. 514 F.2d 1179 (C.A. 7-1975). Doe v. Turner, 361 F.S. 1288 (S.D. Iowa 1973), app. den. 488 F.2d 1134 (CA8-1973).

40. Alyeska Pipeline Service Co. v. Wilderness Society, 495 F.2d 1026 (App. D.C. 1974, rvs. 411 U.S. 240, 95 S.Ct. 1612 (1975); Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974).

RELIEF

An appropriate judgment enjoining defendants and/or their agents and/or their representatives from enforcing the provisions La. R.S. 14:87 (pertaining to the crime of abortion), La. R.S. 14:87 (the anti-abortion advertising statute), La. R.S. 14:88 (the anti-distribution of abortifacients statute), La. R.S. 40:1299.33(D) (the parental or spousal consent statute) and La. R.S. 40:1299.34 (the anti-abortion counseling statute) shall be entered in accordance with the views expressed in this opinion. All other relief sought by plaintiffs is denied.

New Orleans, Louisiana, this 26 day of January, 1976.

s/ Robert A. Ainsworth, Jr.
ROBERT A. AINSWORTH, JR.
United States Circuit Judge

s/ Lansing L. Mitchell
LANSING L. MITCHELL
United States District Judge

s/ Fred J. Cassibry
FRED J. CASSIBRY
United States District Judge
Concurring in part and dissenting in part. Dissenting opinion attached hereto.

CASSIBRY, J., concurring in part and dissenting in part.

I concur in all the Court's opinion in No. 73-469 except as follows:

The only reasonable inference to be drawn from the clear evidence in this case, in my opinion, is that there is a silent policy among those in authority at Charity Hospital of New Orleans which effectively bars elective abortions. Hospital statements of Admission Policy were not disseminated to the hospital staff. Dr. Charles Mary's statement denouncing the *Roe* and *Doe* decisions of the Supreme Court and declaring that no actions would be taken in Louisiana hospitals that destroyed human life was widely disseminated and was obviously still accepted as the policy of the public hospitals of Louisiana.

I would order that the hospital state affirmatively that its staff was prepared to effectuate the mandate of the Supreme Court that elective abortions would be available at Charity Hospital to indigent or otherwise eligible women in the first trimester of pregnancy. More specifically, I believe that the written policy of Charity Hospital as applied by those in charge of its OB-GYN clinic is an unconstitutional infringement upon the fundamental right of privacy as set out in *Roe* and *Doe* and of the equal protection clause of the Fourteenth Amendment.

I would agree, however, that those doctors who have moral and religious convictions against abortions would not be required to participate in these procedures.

As to No. 74-3197, I would hold that Louisiana's informal policy of limiting payment for abortions under Medicaid to only those instances where abortions are necessary to save the life of the Mother are violative of the Medical Assistance

Program of the Social Security Act. *Doe, et al v. Beal, et al*, 523 F.2d 611 (3d Cir., July 21, 1975). I find the majority opinion in the *Doe v. Beal* case persuasive.

s/ Fred J. Cassibry
UNITED STATES DISTRICT JUDGE

APPENDIX II

JUDGMENT OF DISTRICT COURT

FILED: Feb 20, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LINDA FAY WEEKS, Wife of Gary Albert RAIMER and GARY ALBERT RAIMER, on behalf of themselves and all others similarly situated	CIVIL ACTION NO. 73-469
VERSUS	
HON. HARRY CONNICK, District Attorney of the Parish of Orleans; HON. WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana and DR. WILLIAM H. STEWART, Director Health and Human Resources Administration	SECTION "F"
CALVIN JACKSON, M.D. and DELTA WOMEN'S CLINIC, INC.	CIVIL ACTION
VERSUS	
WILLIAM J. GUSTE, JR., Attorney General of Louisiana; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS; HARRY CONNICK, District Attorney; WILLIAM H. STEWART, M.D., HEALTH AND HUMAN RESOURCES ADMINISTRATION, individually and in their official capacities	NO 74-2425 SECTION "F"

MOTHER DOE, Individually and on behalf of her minor daughter, JANE DOE and on behalf of all others similarly situated	CIVIL ACTION
VERSUS	
WILLIAM H. STEWART, M.D., individually and in his official capacity as Commissioner of the State of Louisiana HEALTH AND HUMAN RESOURCES ADMINISTRATION; and GARLAND L. BONIN, individually and in his official capacity as Director of FAMILY SERVICES OF THE STATE OF LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION	NO 74-3197 SECTION "F"
LADY JANE, on behalf of MARY JANE, on behalf of themselves and all others similarly situated	CIVIL ACTION
VERSUS	NO. 75-474
HON. HARRY CONNICK, DISTRICT ATTORNEY of the Parish of Orleans; HON. WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana; WILLIAM H. STEWART, M.D., Commissioner of the LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION; and LEE FRAZIER, Administrator, Charity Hospital of Louisiana	SECTION "F"

CONSOLIDATED

JUDGMENT

These actions brought under 42 U.S.C. 1983 came before a three judge court for hearing on the merits challenging the constitutionality of certain Louisiana statutes, regulations and policies pertaining to abortions.

For the reasons set forth in the Court's opinion:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I. *RAIMER, et al vs. CONNICK, et al - No. 73-469*

1. that Motion of Defendants to dismiss plaintiffs' complaint for lack of standing to sue is denied.

2. that L.R.S. 14:87, a criminal statute prohibiting the performance of all abortions is declared unconstitutional.

3. that L.R.S. 14:88, a criminal statute prohibiting the distribution or advertisement of abortificients is declared unconstitutional.

4. that the written policy of Charity Hospital of Louisiana in New Orleans of July 14, 1974, is constitutional, therefore plaintiffs' motion for declaratory relief is denied.

It is further Ordered, Adjudged and Decreed that plaintiffs request for injunctive relief is denied, however, defendants are to take immediate positive steps to disseminate the written policy of July 14, 1974 to all physicians, house officers and other personnel employed at said hospital, but in no event are those doctors, nurses and other personnel who work at said hospital and who have moral and/or religious convictions against the performance of abortions required to participate in their performance.

II. *JACKSON, et al vs. GUSTE, et al - No. 74-2425*

1. that motion of defendants to dismiss this action based upon the doctrine of abstention and comity is denied.

2. that motion of defendants to dismiss this action for lack of federal jurisdiction under Article III of the U.S. Constitution is denied.

3. that Motion of defendants to dismiss Delta Women's Clinic, Inc. on the grounds of a lack of a "case or controversy" under Article III, Section 2 of the U.S. Constitution is granted.

4. that Motion of defendants to dismiss Dr. Calvin Jackson's suit for lack of standing is denied.

5. that L.R.S. 14:87, a criminal statute prohibiting the performance of all abortions is declared unconstitutional.

6. that L.R.S. 14:87.4 pertaining to the crime of abortion advertising is declared unconstitutional.

7. that L.R.S. 40:1299.33(D), the parental or spousal consent requirement statute, is declared unconstitutional.

8. that L.R.S. 40:1299.34, the anti-abortion counseling statute is declared unconstitutional.

9. that the Medicaid policy of the State of Louisiana, providing payments for therapeutic abortions only is consistent with the Social Security Act of 1935, as amended and is declared constitutional. It is further ordered, adjudged and decreed that plaintiff's request for declaratory and injunctive relief is denied.

III. *DOE, et al vs. STEWART, et al - No. 74-3197*

1. that Motion of plaintiffs to substitute Roy E. Wester-

field for Garland L. Bonin as the Director of the Division of Family Services of the Louisiana Health and Human Resources Administration is granted.

2. that Motion of plaintiffs to certify this suit as a class action is granted. It is further ordered that the class is composed of all pregnant women residing in the State of Louisiana who are indigent recipients of Aid to Dependent Children, are enrollees in the joint Federal-State Medicaid Program, and who desire or will desire abortions within the first trimester of pregnancy.

3. that Motion of defendants to dismiss this action on the grounds that the new Legal Assistance Act prohibits this suit by NOLAC, a federally-funded corporation, is denied.

4. that the Medicaid policy of the State of Louisiana providing payments for therapeutic abortions only, is consistent with the provisions of the Social Security Act of 1935, as amended, and is declared constitutional. It is further ordered, adjudged and decreed that plaintiff's request for declaratory and injunctive relief as requested is denied.

IV. *LADY JANE, et al vs. CONNICK, et al - No. 75-474*

1. that Motion of Defendants to dismiss plaintiffs' complaint for lack of standing to sue is denied.

2. that Motion of Plaintiffs' to certify this suit as a class action is granted. It is further ordered that the class is composed of all unmarried pregnant minors residing throughout the State of Louisiana who desire or will desire abortions within the first trimester of pregnancy.

3. that L.R.S. 14:88, a criminal statute prohibiting the distribution or advertisement of abortificients is declared unconstitutional.

4. that L.R.S. 40:1299.33(D), the parental or spousal requirement statute, is declared unconstitutional.

5. that L.R.S. 40:1299.34, that anti-abortion counseling statute is declared unconstitutional.

6. that the written policy of Charity Hospital of Louisiana in New Orleans of July 14, 1974, is constitutional, therefore plaintiffs' motion for declaratory relief is denied.

It is further Ordered, Adjudged and Decreed that plaintiffs request for injunctive relief is denied, however, defendants are to take immediate positive steps to disseminate the written policy of July 14, 1974, to all physicians, house officers and other personnel employed at said hospital, but in no event are those doctors, nurses and other personnel who work at said hospital and who have moral and/or religious convictions against the performance of abortions required to participate in their performance.

V. That in each of the above consolidated cases defendants and/or their agents and/or their representatives are enjoined from enforcing the provisions of each of the Louisiana statutes hereinabove declared unconstitutional.

VI. That request of plaintiffs in each of the above consolidated cases for attorneys' fees and all other relief sought and herein not specifically granted is denied.

New Orleans, Louisiana, this 20th day of February,1976.

s/ Robert A. Ainsworth, Jr.
ROBERT A. AINSWORTH, JR.
United States Circuit Judge

s/ Lansing L. Mitchell
LANSING L. MITCHELL
United States District Judge

s/ Fred J. Cassibry
FRED J. CASSIBRY
United Staes District Judge (Concurring in part in the above judgment as stated in my dissenting opinion)

APPENDIX III

JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

FILED: JUNE 15, 1976

LINDA FAY WEEKS, Wife of Gary Albert RAIMER and GARY ALBERT RAIMER, on behalf of themselves and all others similarly situated	CIVIL ACTION
VERSUS	NO 73-469
HON. HARRY CONNICK, District Attorney of the Parish of Orleans; HON. WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana and DR. WILLIAM H. STEWART, Director Health and Human Resources Administration	SECTION"F"
CALVIN JACKSON, M.D. and DELTA WOMEN'S CLINIC, INC.	
VERSUS	CIVIL ACTION
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL of Louisiana; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS; HARRY CONNICK, District Attorney; WILLIAM H. STEWART, M.D., HEALTH AND HUMAN RESOURCES ADMINISTRATION, individually and in their official capacities	NO. 74-2425 SECTION "F"

JUDGMENT

This action came on a motion to correct the judgment under Federal Civil Procedure Rule 60(b).

IT IS ORDERED, ADJUDGED AND DECREED:

THAT the reasons for judgment dated January 26, 1976 are hereby clarified and the judgment entered February 24, 1976 is amended as follows:

THAT in accordance with *Connecticut v. Menillo,* U.S. 96 S. Ct. 170 (1975) Louisiana's criminal abortion statute is unconstitutional only when applicable to prosecution for abortions performed by licensed physicians and their supportive personnel. Said statute is not unconstitutional when applied in the prosecution of abortions performed by unqualified personnel.

THAT the Attorney General of Louisiana and/or his agents and/or his representatives are only enjoined from prosecuting licensed physicians and their supportive personnel for the abortion procedure performed in violation of the Louisiana criminal statute L.R.S. 14:87.

New Orleans, Louisiana June 12, 1976.

s/ Robert A. Ainsworth
ROBERT A. AINSWORTH, JR.
United States Circuit Judge

s/ Lansing L. Mitchell
LANSING L. MITCHELL
United States District Judge

s/ Fred J. Cassibry
FRED J. CASSIBRY
United States District Judge

APPENDIX IV

NOTICE OF APPEAL OF DEFENDANTS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

FILED: March 19, 1976

LINDA FAY WEEKS, wife of Gary Albert RAIMER and GARY ALBERT RAIMER, on behalf of themselves and all others similarly situated	CIVIL ACTION NO. 73-469
VERSUS	SECTION "F"
HON. HARRY CONNICK, District Attorney of the Parish of Orleans; HON. WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana and DR. WILLIAM H. STEWART, Director Health and Human Resources Administration	

(Defendants)

NOTICE OF APPEAL

Notice is hereby given that defendants William J. Guste, Jr., Attorney General of the State of Louisiana, Harry Connick, District Attorney, Orleans Parish, State of Louisiana, and William H. Stewart, M.D., Commissioner, Louisiana Health & Human Resources Administration, hereby appeal to the Supreme Court of the United States from the final judgment of a three-judge District Court entered on February 24, 1976. Said judgment held that Louisiana Revised Statute

14:87, a criminal statute prohibiting the performance of all abortions is unconstitutional. Further, that Louisiana Revised Statute 14:88, a criminal statute prohibiting the distribution or advertisement of abortificients is unconstitutional. In addition, that defendants and/or their agents and/or their representatives are enjoined from enforcing the provisions of said statutes declared unconstitutional.

This appeal is taken pursuant to 28 U.S.C. # 1253.

This 19th day of March, 1976.

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

WARREN E. MOULEDOUX
First Assistant Attorney General

LOUIS M. JONES
Assistant Attorney General

JAMES P. SCREEN
General Counsel
Louisiana Health & Human Resources Administration
503 State Office Bldg.
325 Loyola Avenue
New Orleans, Louisiana 70112

JOHN S. BAKER
Assistant District Attorney
Orleans Parish, Louisiana
2700 Tulane Avenue
New Orleans, Louisiana 70119

By: s/ Louis M. Jones
LOUIS M. JONES
Assistant Attorney General
State of Louisiana
2-3-4 Loyola Bldg. - 7th Floor
New Orleans, Louisiana 70112
Phone: (504) 527-8371

APPENDIX IVa

ORDER EXTENDING TIME FOR DOCKETING APPEAL

SUPREME COURT OF THE UNITED STATES

NO. A-965

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL
OF LOUISIANA, ET AL.,
Appellants

V.

LINDA FAY WEEKS, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1976.

s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 4th day of
May, 1976

APPENDIX V

MOTION TO TEMPORARILY STAY PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

LINDA FAYE WEEKS, et al. Plaintiffs	CIVIL ACTION
versus	NO. 73-469
HON. JIM GARRISON, et al. Defendants	SECTION "G"

MOTION TO TEMPORARILY STAY PROCEEDINGS

On joint motion of the undersigned counsel for plaintiffs, defendants and intervening parties; and on suggesting to this Honorable Court that the case of *I. I. Rosen v. Louisiana State Board of Medical Examiners,* Civil Action No. 70-1304 (three judge case) is under reconsideration by mandate of the United States Supreme Court; and that a hearing will be held in which oral testimony will be given on the issue of "when life begins"; and further that a final determination in *Rosen* on the issue of "when life begins" will have a significant effect on the proceedings presently before this court;

Considering the foregoing joint motion of all interested parties:

IT IS ORDERED that all proceedings be temporarily stayed until a final determination is rendered in the case of *I. I. Rosen v. Louisiana State Board of Medical Examiners,* Civil Action No. 70-1304.

New Orleans, Louisiana; 2nd day of August, 1973.

s/ James A. Comiskey
UNITED STATES DISTRICT JUDGE

Submitted by attorneys for
movers this 2nd day of
August, 1973:

For The Plaintiffs:

s/ Laurence Blake Jones
Benjamin E. Smith
s/ Charles (Last Name Illegible)

DATE OF ENTRY AUG. 6, 1973

For The Honorable Jim Garrison:

BY: s/ Russell Schonekas
Russell Schonekas

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

WARREN E. MOULEDOUX
FIRST ASSISTANT ATTORNEY GENERAL

LOUIS A. GERDES, JR.
Special Counsel

s/ Dale C. Wilks
DALE C. WILKS
Special Counsel
6th Floor, 2-3-4 Loyola Building
234 Loyola Avenue
New Orleans, Louisiana 70112

s/ James P. Screen
JAMES P. SCREEN
General Counsel
Louisiana Health and Social and
Rehabilitative Services Administration

s/ Thomas A. Rayer
THOMAS A. RAYER
Attorney for Amicus Curiae

APPENDIX VI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

I. I. ROSEN, M.D.

Plaintiff

versus C.A. No. 70-1304
Section "E"
(Three-Judge case)

THE LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

Defendant

MEMORANDUM AND ORDER

Isadore I. Rosen, a licensed and practicing Louisiana physician filed a complaint attacking the constitutionality of the abortion section of the Louisiana Medical Practice Act, La. R.S. 37:1285 (6) (1964), which authorizes the suspension or revocation of a medical doctor's certificate if the doctor was involved in:

> Procuring, aiding or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician. La. R.S. 37:1285 (6) (1964).

The complaint sought both declaratory and injunctive relief.

This three-judge district court was constituted under 28 U.S.C. §2281 (1948), which provides for such a tribunal whenever the enforcement of a state statute is sought to be enjoined "upon the ground of the unconstitutionality of such statute."

After a hearing on the merits of the case held on June 9, 1970, a majority of this court upheld the constitutionality of the Louisiana statute and denied Doctor Rosen's request for declaratory and injunctive relief.[1] The plaintiff appealed to the United States Supreme Court and that Court vacated the judgment and remanded the case "for further consideration in light of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)."[2]

On remand the plaintiff seeks summary judgment alleging that La. R.S. 37:1285 (6) (1964) is incompatible with the constitutional limitations imposed by the *Roe* decision. The defendant counters with a double edge sword. First, it argues that the United States Supreme Court in *Roe* and *Doe* did not answer the question of when life begins, and that it intends to answer this question by proving that human life and human personality are a continuum, originating at conception and terminating at death. Therefore the defendant concludes that at the moment of conception a fetus is endowed with a constitutional right to life.[3]

---

1 Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (E.D. La. 1970).

2 412 U.S. 902 (1973)

3 A similar argument was made by the Attorney General of Missouri that "The Supreme Court did not determine 'whether an unborn child is human life'; that this is a question of fact which can only be determined by triers of the fact after hearing evidence from expert witnesses; that if human life exists from the moment of conception the State has a compelling interest to protect this life; and that summary judgment cannot be granted when such an issue of fact exists." The three-judge district court found that the teachings of Roe v. Wade, supra, completely contradicted this argument, and the United States Supreme Court affirmed their decision. Rodgers v. Danforth, Civil Action No. 18360-2 (W.D. Mo., May 18, 1973), aff'd. ___ U.S. ___, 94 S.Ct. 534 (1973).

In *Roe v. Wade,* 410 U.S. 113 (1973), Texas asserted that human life commences at conception and is present through pregnancy, ergo, the State has a compelling interest in protecting that life from the moment of conception. The United States Supreme Court succinctly responded thus:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in development of man's knowledge, is not in a position to speculate as to the answer. 410 U.S. 113, 159 (1973).

The United States Supreme Court is the final arbiter of constitutional guarantees and having passed on this issue, the Court has foreclosed any reconsideration by us.

Secondly, the defendant argues that *Roe* and *Doe* can be distinguished from the case at bar in that in the former two cases criminal statutes were involved, whereas we have here a civil statute. The designation of a statute as civil or criminal is immaterial when that statute impinges on a constitutionally protected right. Furthermore, in our prior decision we found the civil statute to be *in pari materia* with the criminal statute and read the two laws as one.[4] Thus, construed, the civil statute clearly suffers a constitutional infirmity in light of the rationale of *Roe* and the stipulated invalidity of the Louisiana criminal statute regulating abortions, La. R.S. 14:87 (Supp. 1973).[5]

4 318 F.Supp. at 1225

5 Weeks v. Garrison, No. 73-469G (E.D. La., filed February 20, 1973); letter from William J. Guste, Jr., Attorney General of Louisiana to District Attorneys and other law enforcement officials, dated March 12, 1973.

We not only hold that La. R.S. 37:1285 (6) (1964) is unconstitutional facially, but that as applied it violates the Fourteenth Amendment to the United States Constitution in that it impermissibly regulates abortion without regard to pregnancy stage, limits abortion to a life-saving procedure without regard to other fundamental rights of the woman, and interferes with the physician's medical judgment respecting his patient. Our decision should not be construed as giving the woman and her doctor an unqualified right to perfect an abortion subsequent to the first trimester; after the initial trimester the State is "free to place increasing restrictions on abortions as the period of pregnancy lengthens, so long as these restrictions are tailored to the recognized state interests".[6]

State legislatures have subsequent to the *Roe* and *Doe* decisions attempted to accord a purely statutory right to fetal life at the expense of abridging a woman's constitutionally protected right. Such legislation has been ruled unconstitutional.[7] A state cannot, by legislative

6 Roe v. Wade, 410 U.S. 113, 165 (1973).

7 In the first Abele v. Markle, 342 F.Supp. 800 (D. Conn. 1972), a three-judge district court, one judge dissenting, found Connecticut's abortion statute unconstitutional. Subsequently, the Connecticut legislature enacted a duplicate abortion statute which declared that it was the intent of the legislature to protect human life from the moment of conception. A second case was brought challenging the constitutionality of the new statute. In Abele v. Markle, 351 F.Supp. 224 (D. Conn. 1972), the three-judge district court, one judge dissenting, held the new statute unconstitutional, concluding that the state had no compelling interest in preserving fetal life in view of the widely differing views about the nature of that life. The United States Supreme Court vacated the appeal in the first *Abele* case as moot, ___ U.S. ___, 93 S.Ct. 1412 (1973), and vacated and remanded the second *Abele* case "for further consideration in light of Roe v. Wade, supra, and Doe v. Bolton, supra, ___ U.S. ___, 93 S.Ct. 1417 (1973). Connecticut petitioned the Supreme Court for a rehearing in the second *Abele* case, arguing that the evidence it had presented demonstrated that a fetus is a human being from the time of conception; a rehearing was denied, ___ U.S. ___, 93 S.Ct. 1891 (1973). On remand, the three-judge district court unanimously declared Connecticut's statute unconstitutional and enjoined its enforcement, Abele v. Markle (D. Conn., April 26, 1973); Doe v. Israel, 482 F.2d 156 (1st Cir. 1973), petition for cert. filed, 42 U.S.L.Week 3587 (U.S. Feb. 11, 1974) (No. 73-1229).

fiat, infringe upon an area which has been foreclosed by the United States Supreme Court from state interference.

Plaintiff's Motion for Summary Judgment is GRANTED; all other relief is DENIED, and it is hereby

ORDERED that the Louisiana State Board of Medical Examiners give full credence to this decision that the present civil abortion section of Louisiana's Medical Practice Act, La. R.S. 37:1285 (6) (1964) is unconstitutional. Costs taxed to the defendant Louisiana Board of Medical Examiners.

s/ ROBERT AINSWORTH, JR.
UNITED STATES CIRCUIT JUDGE
s/ EDWARD J. BOYLE, SR.
UNITED STATES DISTRICT JUDGE
s/ FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
July 11, 1974

No. 70-1304

I. I. ROSEN, M.D.

versus

THE LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

AINSWORTH, Circuit Judge, and BOYLE, District Judge, specially concurring:

This case was first before us in 1970 on the petition of Dr. Rosen, a licensed Louisiana physician who challenged the constitutionality of a provision of the Louisiana Medical Practice Act, La. R.S. § 37:1285(6). That section reads as follows:

> The board may refuse to issue, suspend, or institute proceedings in any court of competent jurisdiction to revoke any certificate [to practice medicine] issued under this Part for any of the following causes:
>
> . . . .
>
> (6) Procuring, aiding or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician; . . . .

At that time Dr. Rosen was charged by the Louisiana State Board of Medical Examiners with participating in abortion procedures in violation of the Louisiana Medical Practice Act, and notified to attend a hearing in that

regard at which he might present an appropriate defense. This suit was then filed by Dr. Rosen for declaratory and injunctive relief to restrain the Louisiana State Board of Medical Examiners from further proceeding against him and more specifically for a judgment declaring La. R.S. §37:1285(6) of the Louisiana Medical Practice Act unconstitutional.

The special three-judge statutory court was convoked for the purpose of deciding the claim of unconstitutionality of the subsection. We considered the matter in great detail and in a lengthy opinion by a majority of the court (Judge Ainsworth as author of the opinion, Judge Boyle concurring therein, and Judge Cassibry dissenting), we held in the strongest possible terms that La. R.S. §37:1285(6) of the Louisiana Medical Practice Act was constitutional and denied Dr. Rosen's request for declaratory and injunctive relief.

Dr. Rosen appealed to the Supreme Court of the United States, which at that time had several cases involving the constitutionality of state abortion statutes before it for consideration. Thereafter the Supreme Court handed down its landmark decisions in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973), and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739 (1973), in which it made clear that the state anti-abortion statutes under consideration were unconstitutional under the conditions set forth in the opinions. Our judgment in the present matter was vacated and the case was remanded to us for further consideration in light of *Roe* and *Doe, supra.*

The Supreme Court's decisions in *Roe* and *Doe, supra,* are in fundamental opposition to the majority opinion

which we wrote in this case pertaining to the anti-abortion provision of the Louisiana Medical Practice Act when it was first before us. We have no alternative now but to follow the Supreme Court decisions on abortion which are the supreme law of the land.

Surely the defendants must realize that as a lower federal court we are indeed bound by the decisions of our nation's highest court and that we have no alternative but to follow them. The defendants appear to be seeking a new approach to the Supreme Court with a view of reversing that court's decisions in *Roe* and *Doe.* If there is to be a change or reversal of the Supreme Court's decisions on the question of abortion the question must be presented by defendants to that court and not to this three-judge federal district court. The Supreme Court has indicated by later decisions, especially its affirmance of the three-judge court in Rodgers v. Danforth, 414 U.S. 1035, 94 S.Ct. 534 (1973), that the issue sought to be injected in the present case by defendants, namely, when does life of an unborn child begin, is foreclosed by the prior holdings in *Roe* and *Doe, supra.*

We have joined the opinion of Judge Cassibry herein which holds La. R.S. § 37:1285(6) unconstitutional because of the clear precedents handed down by the Supreme Court in *Roe* and *Doe* and reaffirmed in Rodgers v. Danforth, *supra.*

s/ ROBERT AINSWORTH, JR.
UNITED STATES CIRCUIT JUDGE
s/ EDWARD J. BOYLE, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX VII

MOTION FOR A THREE-JUDGE COURT

FILED: Sep. 3, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

LINDA FAYE WEEKS, Et Al. — CIVIL ACTION
Petitioner

VERSUS — NO. 73-469

HON. JIM GARRISON, Et Al. — SECTION "G"
Respondent

MOTION FOR A THREE-JUDGE COURT

Now comes harry F. Connick, District Attorney for the Parish of Orleans, a defendant in the above entitled cause, and moves this Honorable Court to convene a three-judge Court under the provisions of 28 U.S.C. § 2281, which is required whenever a party seeks an injunction against the enforcement of a state statute.

HARRY F. CONNICK
DISTRICT ATTORNEY
PARISH OF ORLEANS
STATE OF LOUISIANA

JOHN S. BAKER
ASSISTANT DISTRICT
ATTORNEY
PARISH OF ORLEANS
2700 Tulane Avenue
New Orleans, Louisiana 70119

BY: s/ JOHN S. BAKER

APPENDIX VIII

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED:March 3, 1975

MINUTE ENTRY
MITCHELL, J:
MARCH 3, 1975

LINDA FAY WEEKS, et al — CIVIL ACTION

VERSUS — NO. 73-469

JIM GARRISON, et al — SECTION "F"

The Court on its own motion desires briefs from each party to this action as to whether the three judge court already convened should be continued in existence or dissolved.

In other words, the Court desires that counsel specifically point out to the Court why 28 USC 2281 does or does not apply; i.e. what particular state statutes or administrative orders plaintiffs contend are unconstitutional; why are they unconstitutional; and, assuming that they are unconstitutional, is or is not a substantial constitutional question presented so as to require a three judge court in view of recent Supreme Court decisions.

Briefs, arguments, and authorities directed to this point are to be filed by counsel for plaintiffs no later than noon, Monday, March 10, 1975. Counsel for defendants have until noon the following Monday, March 17,1975, to reply thereto.

LLM